TOTON SIDINGS TVG APPLICATION
Ref: VG136/360 NVG

REPORT OF INSPECTOR D E MANLEY QC

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1. This Report follows the holding of a non-statutory public inquiry into an application made by Mr and Mrs Bakewell ("the Applicants") to register land known as Toton Sidings as a Town or Village Green (TVG). The inquiry sat on 13th April 2015 to 16th April 2015 (inclusive) and resumed on 21st May 2015 to hear legal submissions. I carried out an accompanied site visit on 14th April 2015 and I visited the site unaccompanied on 15th April 2015 (lunchtime) and on Sunday (am) 19th April 2015. The unaccompanied visits were to enable me to observe usage in circumstances where no notice had been given of my presence. My visits revealed regular use of the footpaths and bridleways for walking with and without dogs. On my accompanied visit I saw Network Rail staff crossing the site to access the adjacent operational land.

2. The application was originally made to Nottinghamshire County Council ("the RA") on 25th January 2012 and stamped with that date. The application included Maps A and B without clearly defined boundaries and 39 Evidence Questionnaires ("EQs") and supporting information. Network Rail, DB Schenker Rail (UK) Ltd and Mr Sahota were informed of the application on 23rd February 2012. By reason of the fact that the TVG claimed land falls within both Nottinghamshire County Council's ("NCC") and Derbyshire County Council's ("DCC") administrative areas, it was necessary to make a TVG application to DCC which was done on 4th December 2012. Both applications were made pursuant to Section 15(2) of the Commons Act 2006. On 23rd January 2013 NCC accepted an offer from DCC of delegated authority to determine the application on its behalf.

3. On 30th March 2013 the Applicants submitted a new Plan A with clearer boundaries and at an appropriate scale for the NCC application. The same exercise was undertaken for the DCC application on 29th April 2013. The applications were advertised in August 2013 and objections were lodged by:

- Mr Sahota (principal landowner);
- D B Schenker;
- Network Rail'
- Miss K Gebski of Mayfield Kennels located within the TVG land;
- Mrs C Andrews.

In the event, Mrs Andrews thereafter had no engagement with the RA. Miss Gebski subsequently gave evidence on behalf of Mr Sahota. Network Rail did not engage with the public inquiry and D B Schenker ibid made brief submissions at the start of the inquiry that certain works undertaken on the land in January 2010 prevented 20 years' continuous user being established by the Applicants. Mr Sahota was represented throughout the inquiry process by Mr Pike of Counsel.

4. In July 2014 the Applicants submitted a new Plan B purporting to show a "neighbourhood within a locality." The locality identified was both the electoral ward boundaries of Toton and Chilwell Meadows in Broxtowe, Nottinghamshire and Nottingham Road in Erewash, Derbyshire.

5. The majority of the land in question was purchased by Messrs T and P Sahota at auction in Manchester on 3rd December 2009. The land comprises disused former railway sidings. The land was purchased from BRB (Residuary) Ltd ("BRBR") in whom non-operational railway assets had been vested. BRBR operated the site between 1993 and 2009 in accordance with its statutory undertaking pursuant to a Transfer Scheme of British Railways Board dated 26th January 2001 made pursuant to Section 35(1) of the Railways Act 1993 and by direction of the Secretary of State. By virtue of two Demarcation Agreements dated 22nd April 1996 and 22nd July 1996 made between BRB and Railtrack plc and BRB and English Welsh and Scottish Railway Ltd (now D B

Schenker) respectively, certain access rights were granted and reserved across the claimed TVG land in connection with the adjacent operational sidings. The TVG claimed land ceased to be an operational siding in the early 1980s when railway track and associated infrastructure were removed from the land. There is no doubt, based upon the evidence (see below) that the access rights are regularly exercised by Railtrack and D B Schenker operatives. The 1997 Demarcation Agreement also shows the small triangle of land within the claimed TVG site owned by D B Schenker.

6. The land comprises an irregularly shaped parcel formally accessed from Bessell Lane to the north and Mayfield Grove to the south. Both the access points were gated following the tragic death of a local boy in 1999 . The western boundary of the site is marked by paths and fencing which separate the land from the operational sidings beyond. Various access gates are set into the fencing. The eastern boundary runs adjacent to FP17 which is outside the claimed TVG land for much of its length until FP17 crosses the River Erewash on a footbridge and joins FP4 to run east/west across the site. FP4 then leaves the site's western boundary across a footbridge known locally as Asda Bridge. FP17 was registered in 1961. In June 2014 the Definitive Map was modified to recognise Bridleways 125, 126, 127 and 128 which run in a linear fashion in a north/south direction along the TVG claimed land north of the River Erewash. To the east of the site north of the river is an area of

housing and a public park. To the east of the TVG claimed land south of the river are playing fields and allotments with housing beyond.

7. The physical condition of the land merits specific comment. Entry into the site from Mayfield Grove is by way of a broad tarmac road. The vegetation to the east and west is very dense, although two informal and reasonably well-worn paths can be seen: one running east from the road and one running west. There is considerable evidence of fly-tipping to the west of the path. This initial vegetation makes the site either side of the road generally inaccessible save by way of the two informal paths. Heading north along the road there is generally vegetation either side of the road and to the west there is natural regeneration following the site clearance in 2010 (see below). This is fairly dense but not as dense as the initial area of vegetation.

8. The road then crosses the river (at this point the road and the three bridleways all coincide). There is steel palisade fencing either side of the road while the gate which barred the road and was introduced in 2010 has long been removed. The claimed TVG land to the north of the river has a flat central portion before the land rises to the east. Towards the middle of the site the embankment is very steep. Between Bridleways 126 and 127 there is an informal path which runs through the site in a north/south direction. However, save for these well marked linear routes the site north of the river is largely densely vegetated and in many parts inaccessible by reason of

extensive gorse and broom growth. Even where such is not present, only very limited access is possible in many areas.

9. The site as I have described it is not how it would have appeared over much of the relevant period of claimed use, ie 1992/93 onwards. Following the clearance of the site in 2010 which involved the felling of circa 2,100 trees, a replanting scheme was ordered by the Forestry Commission. The site therefore as it now appears is the product of relatively recent natural regeneration. Prior to 2010 the site was much more heavily wooded and both by reference to the evidence (see below) and common-sense I have no difficulty in concluding that the bulk of the site was generally far less accessible then than now.

10. The TVG claimed land is a Local Wildlife Site (see Page 341 of the Applicants' Bundle).

The Evidence

11. In this section I will summarise key elements of the evidence given by various witnesses. This does not purport to be a verbatim record:

- Mr Hourd:

  Mr Hourd gave evidence relating to a proposal to amend the HS2 route through Long Eaton and Toton. I explained to Mr Hourd that this

evidence, while of interest in itself, was irrelevant insofar as my task was concerned.

- Mr Bakewell:

  Mr Bakewell has lived in the area since 1989. He said he used to walk, run and cycle on the land several times per week and would access the land by way of one of the access points on its eastern side. He described his routes by reference to the use of the "myriad" paths across the site. He said he had taken his daughters sledging on the site, albeit he said this was not a regular occurrence. He said he enjoyed walking and watching wildlife. He said the site was highly valued as a recreational resource by local people.

  In cross-examination he accepted that pre-2010 growth on the site was dense but said it was not uniform and in some places gaps of 3 - 4 feet between trees existed. He said it was possible to walk through the trees if one wished. He confirmed that between 1989-2009 the routes he used for walking, running and cycling had remained "broadly similar". He is a committee member of Toton Environmental Protection Society (TEPS) and said that following the site clearance in January 2010 he sent a "round robin" e-mail to people on the TEPS mailing list. That led to a public meeting at which blank EQs were made available. The primary purpose of the meeting was to discuss planning issues. He thought about 40 EQs were subsequently

returned. He was asked how he derived his witness list and said he had e-mailed the TEPS list and asked who would be prepared to speak. He said photography and sledging activities had been on the open parts of the site. The fishing was by children with nets in the river. He said some children would go off the paths to play hide and seek.

He said he became aware of the site clearance work from a neighbour on a Saturday and visited the site on Sunday and spoke to a man in a bulldozer. It was pointed out to Mr Bakewell that work on clearance had started on 6th January 2010, ie Wednesday, but he said he only heard about it on the Saturday. He said that the fallen trees were pushed up against the western boundary and the foot of the eastern embankment. His attention was drawn to his EQ (Bundle, p.752) and his statement that his pattern of use had been the same until the felling and his statement that he had been prevented from using the land by "felled trees barring access and gates to informal footpaths - climbed over." I note that similar observations are made in other EQs. He said it was still possible to get onto the site from the northern end. He also said there were areas where the tree barrier could be crossed. He said he thought the fence and gate on the vehicular bridge was to prevent vehicular access. It was put to Mr Bakewell in terms, "The landowner was sending you a message - It was his land and he would do what he wanted with it." Mr Bakewell said, "Maybe." He acknowledged signage was placed on the Bessel Lane, Mayfield Grove

and bridge gate. He said he thought the signs only related to vehicular access. It was put to him that one sign said "Private Land. Keep Out" and one sign said "Please Keep Gate Closed At All Times." He said he did not see the signs that were replaced on the Bessell Lane and Mayfield Grove gates in September/October 2011 or the signs that were there in the 1990s. He said he regularly saw rail operatives on the TVG claimed land - often in a flat-back truck. He said he was aware of the boreholes being sunk in 2011 and said it possibly occurred over ten days or so. He says it occurred over the bulk of the site. He could not recall what plant and equipment he may have seen. He said he reported it to the Council.

- Mrs Sally Carnelley:

  Mrs Carnelley is the proprietor of the St Leonard's Riding School and said she had used the land for 45 years for hacking out with clients. She lived in Raeburn Drive for three or four years. There is no suggestion that the riders she and her daughter take out onto the land come from within the claimed neighbourhood. Mrs Carnelley described the route that she and the riders take. Mrs Carnelley said she had seen the tree felling but kept the horses away because it was noisy. She said the gate at Mayfield Grove was locked for a while but then open. She said she saw the signs on the gate over the vehicular bridge which said "Keep Out", but the gates were not there for long. She also saw the signs on the Mayfield and Bessell Lane gates.

- Mr Lewis:

  During the relevant period he lived on at Aldridge Close and Newmarket Way, leaving in 2011. He said he was a keen birdwatcher and that his family regularly walked the dog on the land. He said they did not necessarily stick to the well-used paths. He said he saw the bridge gate and signage but they were not in place for long. He said he never saw the gates at Bessell Lane or Mayfield Grove because he did not use those parts of the site. He said he was aware of the 2010 site clearance work and said he did not go onto the land because "It was very difficult to get onto the site; it was as if the wood had been piled up to keep us out. I did not get on that day [Saturday] but I just stood at the top of the embankment. It wasn't obvious where you could get on anywhere." He said he had seen railway company vehicles on the land.

- Mrs Bryce:

  Mrs Bryce has lived on Marlborough Road since the 1980s. Mrs Bryce's statement dealt exclusively with the wildlife interest of the site. She went on formal walks on the site with the Natural History Society "every four years or so." She said the gates were sometimes locked (although I remain unclear as to which gates Mrs Bryce was actually referring to). She recalled the site clearance and said she stayed away. When asked for how long, she said "It could have been weeks." She said she had seen railway workers on site "sporadically".

She said she did not go onto the site in winter but she had heard about the boreholing activity.

- Christine Batham:

  She has lived at 3 Edale Rise for circa 30 years and is a keen dog walker. She said she had seen people riding and walking on the land and children playing. She said she tended to stay on the paths but might go off "to look at the flowers." She said she could not recall any signage on the gates. She had not seen borehole activity. She had seen railway operatives on the land. I asked Mrs Batham whether her walking routes were the ones the other walkers she saw used and she replied "Yes."

- Mr Roche:

  Mr Roche has lived at 5 Edale Rise for 29 years and said he and his family had used the site for years for walks and play. He said he had started taking his grandson onto the site for play about three years ago. He recalled seeing the gate and signage on the bridge in 2010 but said he thought it was to prevent vehicular access. He was made aware of the site clearance works by a neighbour and went down to the site the following Wednesday, ie 13th January 2010. He said he was shocked by what he saw and said "… I didn't go onto the land; I didn't think it was the thing to do." He was asked, "The action of clearance deterred you from going on?" He replied "Yes." He was asked how he subsequently accessed the site and said it was through a gap in the

banked up trees. He did not know if people had made the gap. He has never accessed the site from Bessell Lane or Mayfield Grove. He saw the borehole testing. He said he had never seen rail operatives on the site.

- Emma Wickins:

  Emma Wickins lives at 50 Spinney Rise. Mrs Wickins has a four year old son and she takes him onto the site. She has a regular route which uses the paths on the top part of the embankment so that her son can watch the trains. She said until she had children she had not used the land herself since the early 1990s when she was 15 or 16 years of age. It therefore follows that her earlier use was prior to the commencement of the relevant 20 year period. She went to look at the site in 2010 following the clearance because it had been locally reported. She saw wood and brush pushed up against the foot of the embankment. She said she had accessed the site from Bessell Lane but had never noted a gate. She had never seen any rail operatives on site and had not witnesses any boreholing.

- Mr Hooton:

  Mr Hooton lives at 29 Orpean Way. He says he has walked the site daily since retiring in 2012, but prior to this used the site regularly for dog walking. He moved to his present address 26 years ago when his children were 9 and 16 (Tracy). He said his daughter was not the outdoor type but his son used the land a lot. He said he had never

seen signs on the gate at Bessell Lane or Mayfield Grove. He said he "probably" saw the signage on the gate on the bridge. He said the Mayfield Grove gates had not been locked during the day for years.

- Mrs Bailey:

  Mrs Bailey has been a resident of the claimed neighbourhood for in excess of 20 years. She said her children (now aged 30, 27 and 19) had used the land for play and that she walks the site daily. She has a route using the paths. She recalled the site clearance was in 2010 and was asked "So the felling of the wood, in your view, prevented or discouraged use of the land by residents?" Mrs Bailey replied "Yes." She was asked if she had ever seen the Bessell Lane gate closed and she said it was closed every time she walked that way. She said she had never seen the signage on the bridge gate. She said rail operatives used the land "a couple of times a day" and had done since 1992/93. She said she witnessed the 2010 clearance from the top of the embankment but did not go back onto the flatter part of the site for one week or so. Access was via a gap in the banked-up trees. Mrs Bailey said "We found a little sneaky way in."

- Mrs Jackson:

  Mrs Jackson lives at 26 Cleve Avenue. Mrs Jackson has lived at her address for nearly 40 years and regularly walks with Mrs Bailey on the site. She walks on the top of the embankment. She said her

recollection of the 2010 clearance was similar to Mrs Bailey's. She said "We didn't go down - it was dangerous with the dogs."

- Mr Carruthers:

  Mr Carruthers lives at 12 Rutland Avenue. He said the land has been used for recreation by Toton residents for many years. He saw the bridge gate and the signage. He did not see the clearance work. He likes to paint from the top of the embankment.

- Karen Barker:

  Mrs Barker produced various photographs pre-January 2010 which show children playing on a path on the lower part of the site in the snow. She walks the site along the normal well walked routes. She became aware of the clearance through the local BBC News and went and saw the work on the Saturday. She said it was several weeks before she went back onto the land. I asked her "Why?" and she replied "It wasn't very nice." I asked "Was it the kind of place you would wish to recreate in?" She replied "No." She was unaware of the main entrance gates.

- Mrs Wilson:

  Mrs Wilson lives at 21 Orpean Way. Mrs Wilson has been a resident of No.21 since December 1994. The children were then 8 and 9. Her children used to swim in the river but in a location outside the site. She walks the site but usually it is by way of a fixed route to the convenience store beyond Asda Bridge. She saw the clearance work

in 2010 and said "We had no cause to go on it [the land] then." She said she might be the "most unobservant person in the universe," but she could not recall the bridge gate or any signage, borehole sinking or having seen rail workers on the land.

- Mr Lewis, MBE:

  Mr Lewis is in his 80s and has known the site all of his life. In the 1980s and 1990s his visits to the site were seasonal due to his particular wildlife interests. These visits might be once per month in the summer. He saw the clearance of the site in 2010 and saw the signage on the gate on the bridge which he said was "a bit forbidding." He said "I thought they were inappropriate because we had prescriptive rights." He said he also saw the gate and signage at Mayfield Grove. He had seen rail operatives on site fairly regularly.

- Mrs Hoskins:

  Mrs Hoskins has lived at 16 Epsom Road since 1989. She has seen people trainspotting from the top of the embankment and sledging down it. Over the years she has walked three dogs on the land on an almost daily basis. She saw the clearance work and did not revisit the site for five or six days after that. She saw the boreholing activity and has seen railway workers on the land from time to time.

- Mrs Donovan:

  Mrs Donovan has lived at 11 Erdington Way for 27 years. She said in 1993 her eldest child was 8 years of age and would play on the site

weekly. For her own part, she said he used it two to four times per week. She saw the clearance in 2010 but it did not prevent her walking on the site. She said she was aware of the Bessel Lane gate and said over the years several signs had been in place stating "Private Land - Keep Out" or words to that effect. She also saw the signage on the gate on the bridge. She said she sees railway workers on the land.

- Mr Wickins:

  He has lived at 48 Spinney Rise since 1971. He walks the site infrequently - possibly ten times per summer - using a well walked route with his wife. He went to see the 2010 clearance work and was asked, "Did you go onto the land?" He replied "There was no point in going on; I could see what had happened …" He could not recall seeing a gate at the Bessell Road entrance and had never been onto the site from Mayfield Grove. He said he had not been on the site much since 2010. I asked him why and he said, "It upset me."

- Mr Donovan:

  Mr Donovan has lived at 11 Erdington Way for 27 years. He said his family used the land when the children were smaller and he walks the site with his wife three or four times per week. He was asked about the clearance in 2010 and the mounding of trees at the foot of the embankment and he said "That did prevent access as a matter of fact." I asked him if his perception at the time was that a clear attempt had

been made to prevent access and he replied "Yes." He had seen the gates at Mayfield Grove and Bessell Lane but could not recall signage.

- Mrs Bakewell:

  Mrs Bakewell said there were 460 people in the TEPS e-mailing list. TEPS was reformed after the 2010 felling (it had previously existed but gone quiet after 1991). TEPS is not solely concerned with the site but also various planning issues in the area. Mrs Bakewell has always enjoyed walking on the land and meeting people while out. Her grandchildren play on the land. Pre-2010 she used to enjoy sitting amongst the trees and relaxing. She said that the access gates and the banked trees did not prevent access due to the multiplicity of ways onto the site.

- Councillor Kee:

  Councillor Kee has lived at 43 Banks Road since 2007. Councillor Kee uses the site for walking and running on a regular basis over a 5 km loop. She was told about the 2010 clearance work but did not see the site for some weeks after.

The Evidence for the Objector, Mr Sahota

12. Evidence was given by Mr Wallace, a solicitor, which related to the ownership issues pertinent to the land. I also heard from Mr Natkus, a

Chartered Town Planner with Messrs Barton Willmore, which dealt primarily with planning issues.

- Miss Gebski:

  Miss Gebski has operated a kennels from within the site for many years. She recalled that in the mid-1990s locked gates were installed at the Mayfield Grove site entrance and signage that said "Property of Network Rail. No Trespassing on the Railway." She said the land had always been used by dog walkers, riders and some cyclists. I asked her about the site pre-2010 and she said that there was a dense silver birch wood. She said, "It was very gloomy under the trees - not much could grow - it was very dense. There was some gorse." She said walkers etc always stayed on the paths. She said she has always walked the site daily at variable times. She said the Mayfield Grove gates were not locked during the day. She said she had only seen people in the woods on one occasion: "Two lads in camouflage with airguns." She confirmed that the southern neighbourhood area was self-contained and it was "our neighbourhood area."

- Mr Sahota:

  He confirmed that site clearance work was carried out between 5th January 2010 and 9th January 2010. He said it was cleared for management purposes, ie to investigate whether ash and ballast was recoverable. The mounding of the trees at the embankment was to secure the site. He said that gates were in place at the site's main

entrances in 2009 and that he arranged the fencing and gate installation on the bridge in January 2010. Two signs were placed on each of the gates. The gates on the bridge and the signage were in place for several weeks before they were removed. The signs on the other two gates were in place for over one year before they were removed. In September 2011 Network Rail replaced the signs on the Mayfield Grove and Bessell lane gates (see objector Bundle, p.894) to read "Private Property - Right of Way only for Railway Personnel. Secure Gates after use with Combination Lock …" These gates had been operated by padlock until in August 2011 they were replaced by combination locks. It is unclear how long the signage remained in place.

The Law

13. Section 15(1) and (2) of the Commons Act 2006 provides as follows:

> "**15. Registration of Greens**
>
> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where –
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports

> and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application."

It can be seen that the above definition raises a series of questions which have exercised the Courts.

- What is a "significant number"

  "Significant number" is a concept that is relative to the size of the locality and/or neighbourhood relied upon. The issue is one of impression and the key question is whether the number of inhabitants using the land over the relevant 20 year period was sufficient to show that the land was in general use by the local community for informal recreation (see *R v. Staffordshire County Council ex parte Alfred McAlpine Homes Ltd* [2002] 2 PLR 1).

- What is a "locality"

  "Locality" refers to an administrative unit that is recognised in law. It has been held that an ecclesiastical parish therefore can be a qualifying locality (see, for example, *R (on the application of Laing Homes Ltd) v. Buckinghamshire CC* [2003] EWHC 1578 (Admin)). A locality will not, without more, be sufficient for Section 15 ibid purposes simply because it has legal recognition. In *Suffolk CC ex parte David Donald Steed and Another* [1996] 71 P & CR 463 Carnwath J, as he then was, said in the context of the 1965 Commons Act:

  > "To state the obvious, a town or village green, as generally understood, is an adjunct of a town or

> village or something similar. As such it may be contrasted with open spaces of various kinds, for example recreation grounds maintained by local authorities for the public generally (eg under the Open Spaces Act 1906) school playing fields; or areas of a more private nature, such as London garden squares, or land set aside under a building scheme for the occupants of a particular private development. None of these categories would naturally be regarded as 'town or village greens'. The statutory word 'locality' should be read with this in mind. Whatever its precise limits, it should connote something more than a place or geographical area - rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right. In the present case, the 'locality' on which the application for judicial review and the supporting affidavit rely is Sudbury itself; I agree that this is the only realistic basis on which to proceed."

This was followed by *R (on the application of Cheltenham Builders Ltd) v. South Gloucestershire DC* [2003] EWHC 2803 (Admin) in which Sullivan J (as he then was) noted:

> "[43] Whatever may be meant by 'locality' is subsection 22(1A) I am entirely satisfied that it does not mean any area that just happens to have been delineated, in however arbitrary a fashion, on a plan. Such an approach would, in effect, deprive the word 'locality' of any meaning in the subsection, since anywhere could be delineated on a plan.
>
> [44] Parliament might have provided that land fell within section (1A) if a significant number of 'the local inhabitants' or 'persons living in the vicinity' had used the land for lawful sports and pastimes, but it did not do so.
>
> [45] Setting the claimant's submissions as to the meaning of 'locality' on one side (see *post*) it is plain that, at the very least, parliament required the users of the land to be inhabitants of somewhere that could sensibly be described as a

> 'locality'. It may well be difficult to define the boundary of a 'locality' on a plan because views may differ as to its precise extent, but there has to be, in my judgment, a sufficiently cohesive entity that is capable of definition. Merely drawing a line on a plan does not thereby create a 'locality'. In *Steed*, Carnwath J said, at p.501:
>
> > 'Whatever its precise limits, it should connote something more than a place or geographical area - rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right.'
>
> Although these observations were *obiter*, since there was no dispute that Sudbury was a 'locality' for the purposes of the Act, they capture the essential characteristics of a locality."

The *Cheltenham* case was a locality case, albeit post the introduction of the concept of neighbourhood by the Countryside and Rights of Way Act 2000. However, more recently it has been suggested that "locality" is to be interpreted the same way in neighbourhood cases as well. In *R (on the application of Mann) v. Somerset CC* [2012] EWHC B14 (Admin) His Honour Judge Robert Owen QC sitting as a Judge of the High Court observed:

> "95. Mr Laurence placed much reliance upon the recent decision of *Adamson v. Paddico (261) & Ors* [2012] EWCA Civ 262, in particular paragraphs 27 – 29 per Sullivan LJ and paragraph 62 per Carnwath LJ (as he then was). Mr Chapman submitted that these passages were indeed obiter and addressed the question whether a conservation area could stand as a locality, namely 'community' in the first limb of the sub-section and did not affect, in any event, the second limb, 'neighbourhood within a locality'. He disagreed with Mr Laurence's submission that

'locality' necessarily has the same meaning or effect in both limbs. Mr Chapman's submission has some support from Carnwath LJ (see paragraph 51).

96. Mr Chapman referred to the history of this issue within these proceedings to show the equivocal stance taken by the interested party on this issue. The history does not, of itself, undermine Mr Laurence's argument, of course. However, the Inspector found on the evidence that the requirement in respect of a significant number of inhabitants of any locality, the polling districts identified in the application form was met and that the inhabitants, in any event, were from a neighbourhood within a locality (which could be more than a single locality as explained by Lord Hoffmann) which met any requirement as to cohesiveness.

97. Finally, Mr Chapman submitted that even if there was merit in the objection taken in respect of the inspector's finding as to locality such objection could fairly be cured without causing prejudice to the interested party. I recognize Mr Laurence's point that the locality must have a real or credible relationship with the field in question. For the reasons given by the inspector that criteria was established on the available evidence. I also accept that the locality must be credible in the sense that it is one from which inhabitants might be expected to come to enjoy the land. It is for that reason that the relevant locality could hardly or credibly be identified as, to use Mr Laurence's example, 'the county of Surrey' (or Somerset). As an alternative, to meet the theoretical or technical objection raised (late in the day) by the interested party those who know the area and locality (in the non technical sense) are content to identify Yeovil which it appeared to the inspector, the defendant and claimant to be a credible and appropriate substitute. Thus, the interested party's objection may be met by amendment.

98. On balance, I prefer the findings and conclusion of the inspector in his report(s) which mirrors the

approach taken by the defendant and which Mr Chapman adopts, namely, on the facts of this case, the polling districts in question constitute the relevant locality for the purposes of the section. In so far as that finding is impermissible then the matter may be cured by the proposed amendment."

There is some judicial support for the proposition that a "locality" under both limbs (a) (a pure "locality" case) and (b) (a "neighbourhood within a locality" case) must be credible and have some sense of connection with the TVG claimed land. If it were otherwise, it is difficult to see why "locality" is a prerequisite under limb (b) given that, as a simple matter of fact, a neighbourhood must lie within an administrative unit known to law.

- What is a "neighbourhood"

  While a neighbourhood need not necessarily have boundaries, it must be capable of a meaningful description and have a pre-existing cohesiveness, ie an identity that is not dependent on the claimed land (see *Cheltenham Builders* ibid and *R (on the application of Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Another v. Oxfordshire CC* [2010] EWHC 530 (Admin). It is a matter of fact for the decision-maker using common-sense. In *Cheltenham Builders* ibid Sullivan J gave the example of a housing estate as being capable of falling within the definition.

- What is meant by "have indulged as of right in lawful sports and pastimes"

  The use must be without force, stealth or the permission (implied or express) of the owner. The user itself must have been "of such amount and in such manner as would reasonably be regarded as the assertion of a public right" (see *R (on the application of Lewis) v. Redcar and Cleveland BC* [2010] UKSC 11). The use must be of such

a character as to make it clear that the TVG rights are being asserted and the test is an objective one. The pattern of the use must be continuous over the period claimed (see *White v. Taylor (No.2)* [1969] 1 Ch 160). Use of a defined route only as a footpath is not a qualifying TVG use (see *Dyfed CC v. Secretary of State for Wales* [1990] 59 P & CR 275 and *Oxfordshire Count Council v. Oxford City Council* [2004] Ch 253. Lawful sports and pastimes is a composite class which could include communal activities or solitary activities. It is not to be interpreted in an unduly legalistic manner. However, sporadic events such as the holding of an annual bonfire would not of themselves qualify (see *Redcar* ibid). However, the necessity for lawfulness means that the use should not damage the landowner's property. It is not necessary that all of the claimed land has necessarily been used. If non-used areas are nonetheless integral to the enjoyment of the used area or otherwise represent only a modest percentage of the application area, then that should not be an obstacle to registration. A measure of common-sense has to be used.

The phrase "as of right" was usefully considered by Lord Rodger of Earsferry in the *Redcar* case at Paragraphs 87-92. They are instructive and so I set them out in full:

> "[87] The basic meaning of that phrase is not in doubt. In *R v. Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 35 Lord Hoffmann showed that the expression 'as of right' in the Commons Registration Act 1965 was to be construed as meaning *nec vi, nec clam, nec*

precario. The parties agree that the position must be the same under the Commons Act 2006. The Latin words need to be interpreted, however, Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.

[88] The opposite of 'peaceable' user is user which is, to use the Latin expression, *vi*. But it would be wrong to suppose that user is *'vi'* only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts *vis* was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done *vi*. See, for instance, D.4324.1.5-9, Ulpian 70 *ad edictum*, commenting on the word as used in the interdict *quod vi aut claim*.

[89] English law has interpreted the expression in much the same way. For instance, in *Sturges v. Bridgman* (1879) 11 Ch D 852, 863, 43 JP, 48 LJ Ch 735, where the Defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:

> 'Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, *or which he contests and endeavours to interrupt*, or when he temporarily licenses' (emphasis added).

> If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being *vi* and so does not give rise to any right against him. Similarly, in *Dalton v. Henry Angus & Co* (1881) 6 App Cas 740, 786, Bowen J equated user *nec vi* with peaceable user and commented that a neighbour, 'without actual interruption of the user, ought perhaps, on principle, to be enabled ty continuous unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Baton v. Swansea Waterworks Co* (1851) 17 QB 267, 20 LJQB 482, 15 Jur 675.' The contrary view, that the only manner in which enjoyment of window lights could be defeated before the Prescription Act was by physical obstruction of the light, 'was not the doctrine of the civil law, nor the interpretation which it placed upon the term "*non vi*" …'

[90] In short, as *Gale on Easements* 18th ed, (2002), para 4084, suggests, user is only peaceable (*nec vi*) if it is neither violent nor contentious.

[91] In *R v. Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335, 350-351, Lord Hoffmann found that the unifying element in the three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right. In the case of *nec vi* he said this was 'because rights should not be acquired by the use of force'. If, by 'force', Lord Hoffmann meant only physical force, then I would respectfully disagree. Moreover, some resistance by the owner is an aspect of many cases where use is *vi*. Assuming, therefore, that there can be *vi* where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

[92] If, then, the inhabitants; use of land is to give rise to the possibility of an application being made for

> registration of a village green, it must have been peaceable and non-contentious. This is at least part of the reason why, as Lord Jauncey observed, in the context of a claim to a public right of way, in *Cumbernauld and Kilsyth District Council v. Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44, 47, 'There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor'."

The law upon the approach to the effect of a notice or notices was considered by Judge Waksman QC in *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Another) v. Oxfordshire CC* [2010]LGR 631. Having reviewed various cases he stated, inter alia, as follows:

> "[22] From those cases I derive the following principles:
>
> (1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;
>
> (2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;
>
> (3) The nature and content of the notice, and its effect, must be examined in context;
>
> (4) The notice should be read in a common sense and not legalistic way;

(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey H in *Brudenell-Bruce's* case to 'consistent with his means'. That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. As it happens, in this case, no point on means was taken by the authority in any event so it does not arise on the facts here."

The above statements relating to the law relate to general principles. In this case, certain discrete and specific legal issues also arise which I shall deal with during my analysis of the case.

Analysis

14. I should say at the outset that the Application is, in my view, flawed in a number of ways and my very firm recommendation is that it should be

rejected. I set out my detailed reasons below. But at the outset I want to note a particular problem. The Applicants were reminded by the RA on a number of occasions following the lodging of the Application of the need to identify a relevant locality and, if a neighbourhood was relied upon, a relevant neighbourhood. They were slow to do this and while they had condescended to particulars prior to the inquiry their evidence failed to explain how the areas chosen could be characterised as relevant localities and neighbourhoods for the purposes of Section 15(2) ibid. This was therefore an important issue for the inquiry itself. The burden of proving each element of Section 15(2) ibid lies squarely upon the shoulders of the Applicants. To this end I therefore told Mr Bakewell at the start of the inquiry that he would need both by himself and through his witness to explain why the localities and neighbourhoods were relevant and in particular what it was about the claimed neighbourhoods that meant they could be properly characterised as neighbourhoods for the purposes of Section 15(2) ibid. In fact, no evidence at all was led on this. The only person who commented at all was Mrs Gebski, but this only related to the southern claimed neighbourhood.

15. While it may be possible for an Inspector unfamiliar with an area in some cases to identify himself exactly what it is that makes a claimed neighbourhood satisfy Section 15(2) ibid purposes, this is not such a case. I have not been able to conclude, in the absence of evidential assistance, that the claimed neighbourhoods are in fact neighbourhoods for Section 15(2)

purposes. In particular, I do not understand what makes them distinct from the rest of Toton. On this basis alone the claim must therefore fail.

16. It is nonetheless my duty as Inspector to consider all the key issues raised as between the parties and therefore I shall proceed to discharge that duty.

17. It follows that consideration of the issue of whether there has been use of the land by a significant number of the inhabitants of the claimed neighbourhoods is somewhat academic given that I have concluded they are not qualifying neighbourhoods. Nonetheless, one of the problems with choosing a relatively large claimed neighbourhood area, as in the present case, is that for the test to be satisfied usage by a relatively large number of people would need to be established to demonstrate general community use. In that context, it is surprising that only 39 Evidence Questionnaires were submitted, ie there are 460 people on the TEPS mailing list and issues relating to the land were common knowledge. Mr Natkus' unchallenged evidence was that the Applicants' own written submitted evidence showed that less than 5% of the population of the claimed neighbourhood had claimed to use the land for recreational purposes. The clear impression I formed from listening to the evidence in particular was that there are a number of people who do use the land regularly and some who use it fairly infrequently, but taken at its highest I do not believe that the use evidenced could be equate with general community use.

18. I now turn to consider whether there has been continuous use of the land for the necessary 20 years. Leaving all else aside, the Applicants could never have succeeded in satisfying this requirement. The January 2010 clearance of the land was a dramatic and brutal event involving the felling of 2,000 or more trees. Contractors worked over five days continuously using bulldozers. Nobody claimed to have recreated on the land while this was going on; indeed, it is difficult to see how anybody could have safely used the land during this period save possibly for use of the land at the top of the embankment. The use of the land effectively excluded the public not only while the work was going on but the mounding of the material along the base of the embankment also discouraged many people, as my notes indicate, from accessing the land for a week or more after the event. This event itself was enough to break necessary continuity of use. I note other activities took place on the land in Spring 2010 (removal of cabling by thieves over two days) and April 2011 (widely dispersed boreholing over a ten day period), but I am not convinced that these events had the effect of excluding the public or were, in principle, incompatible with general recreational use. Nonetheless, the fact remains that the dramatic events of January 2010 were wholly incompatible with recreational use and broke the necessary continuity of use.

19. Whether the land was used for lawful sports or pastimes - It was patently clear from the evidence that the land as a whole has not been used by the

community of users for sports and pastimes. The evidence which I have been at pains to set out in this Report was consistent with use of the land for walking, jogging, cycling and riding on the well marked footpaths and bridleways. Use of fixed routes is not a qualifying use and it is not a use that could put any reasonable landowner on notice that a right to recreational use over all of his land was being claimed or established. The reason that the use was so confined was due to the fact that over most of the clamed period of use the vast majority of the site was densely vegetated. I have no doubt on occasion that children may have accessed areas to play hide and seek and such like, but this use would have been no more than occasional trespass and cannot be characterised by continual community use of the whole site.

20. The above further begs the question of whether use over the 20 years claimed period has been "as of right". Again this test is failed by the claim. I accept Mr Sahota's evidence that immediately following the January 2010 site clearance he arranged for fencing and gates to be installed on the bridge and that two signs were then placed on all gates, ie at the main entrances and over the bridge. Whilst the bridge gate and signs were removed by unknown third parties after only a few weeks, the main entrance gate signs were in place for over one year. The wording of the signs was unequivocal, namely "Private Land. Keep Out" and "Please Keep Gate Closed At All Times". To any reasonable reader the signs were a clear indication that their presence on the land as a whole was not welcome. I rejects attempts to suggest that the signs

conveyed prohibition of vehicular access only. Moreover, once one combines the signage with the clearance events of January 2010 and the mounding of significant volumes of felled material at the foot of the embankment, it would have been clear to any reasonable person that third party use of the land was not welcome. Any use in defiance of the mounding and signage was contentious and by force. For the avoidance of doubt, I further accept Mr Pike's submission in the terms set out in his closing remarks that any use of the site as a whole prior to 2009 would have been trespass and unlawful by virtue of the operation of Section 55(1) of the British Transport Commission Act 1949. Again, use in these circumstances must be characterised as use by force.

Statutory Incompatibility

21. The Supreme Court decision in *R (on the application of Newhaven Port and Properties Limited) v. East Sussex County Council & Another* [2015] UKSC 7 is a recent development in the law relating to Section 15 of the 2006 Act. It is now clear that the 2006 Act cannot be read so as to enable registration of land as a TVG if such registration would be incompatible with the land's statutory function. This is because the registration of the land as a TVG would make it unlawful for the relevant statutory undertaker to either damage the green or interrupt its use for recreation. The claimed land was held over many years by BRTS and BRBR for statutory purposes and the land was and is regularly

used to access the operational sidings. It is self-evident that circumstances could have arisen whereby the statutory undertakers' use of the land could have been incompatible with recreational use. This finding of itself is enough to deliver a fatal blow to the Application.

22. I now turn to a final matter raised on behalf of Mr Sahota by Mr Pike. It has been argued that multiple trigger events for the purpose of Section 15(c) of the 2006 Acts had occurred prior to the Application so that the RA has no jurisdiction to entertain the Application. The question arises as to whether Section 16(5) of the Growth and Infrastructure Act 2013 is engaged and which provides as follows:

> "The amendment made by subsection (1) [ie the insertion of section 15C and Schedule 1A into the Commons Act 2006] does not apply in relation to an application under section 15(1) of the Commons Act 2006 which is sent before the day on which this section comes into force."

The provisions came into force on 25th April 2013.

23. The Application was sent to NCC on 25th January 2012 and to DCC on 4th December 2012. I am familiar with *Church Commissioners for England v. Hampshire county Council* [2014] EWCA Civ 634 and I drew attention to it at the very beginning of the inquiry. It is my view that the approach in that case, albeit a case in respect of Section 15(4) of the 2006 Act, is applicable to Section 15(c), namely that a corrected application can have retrospective effect. Applicants in Section 15 cases are almost invariably lay people and

just as the Courts have recognised that a degree of latitude is appropriate in respect of Section 15(4) ibid it is my view that that approach applies here. I am further aware that it is for the decision-maker to decide whether a defective application has been put in order within a reasonable time. Understandable delay in this case was caused by the need to make a duplicate application to DCC and for DCC to delegate powers to NCC. Thereafter NCC afforded time to the Applicants to address the defects in the Application in respect of defining a locality/neighbourhood. I am mindful, however, that it was a significant time after the DCC issue was resolved before the defect in the Application in respect of the locality/neighbourhood issue was drawn to the Applicants' attention. NCC did not regard the time taken to address the defect as unreasonable and I see no reason to disagree with their views on this issue.

I therefore formally recommend that NCC proceeds to determine the Application and that it should reject the same for the multiple reasons contained in my Report.

D E MANLEY QC

28th May 2015

TOTON SIDINGS TVG
APPLICATION

Ref: VG136/360 NVG

REPORT OF INSPECTOR
D E MANLEY QC
